COMMONWEALTH OF MASSACHUSETTS
COMMUNITY ANTENNA TELEVISION COMMISSION

In re	)	
	)	Docket No. R-22
Cable Television	)	
Revision of Rate Setting	)	Released December 17, 1993
Regulations	)	

SECOND REPORT AND ORDER

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I. Procedural Background

1. On September 24, 1993, the Massachusetts Community Antenna Television Commission (the "Commission") issued a Report and Order and Further Notice of Proposed Rulemaking: In re Cable Television Revision of Rate Setting Regulations, CATV Docket No. R-22 (the "Further Notice"). The Commission conducted four public hearings on the matter: November 15, 1993 in Boston; November 16, 1993 in Danvers; November 17, 1993 in Westfield; and November 18, 1993 in Falmouth.

2. At the hearing in Boston, the following individuals testified: Sheila Mahoney and Marti Green, Cablevision Systems Corp.; Nick Leuci, Time Warner Cable; Cameron F. Kerry, representing New England Cable Television Association, Inc.; Susan M. Eid, Continental Cablevision; Thomas P. Cohan, City of Boston; William August, Law Offices of Howard E. Horton; Raymond McDonald, Medford Cable Advisory Committee; and Ed O'Brien, Watertown Cable Advisory Committee.

3. At the hearing in Danvers, the following individuals testified: David Allen, Concord Cable Television Committee; Chuck Simpson, Danvers CATV Committee; Representative Sally P. Kerans; and Richard Antalik, Lynnfield Cable Advisory Committee.

4. At the hearing in Westfield, the following individuals testified: Robert H. Kugell, Shelburn/Buckland Cable Advisory Committee; David Pandolfi, West Springfield Cable Advisory Committee; William Bean, Four Town Cable Television Committee; John S. Fouhy, Continental Cablevision; and John Maefsky, Greenfield, Cable Advisory Committee.

5. At the hearing in Falmouth, the following individuals testified: Mary Schumacher, Falmouth Cable Advisory Committee; Les Hopkins, Sandwich Cable Advisory Committee; Bob James, Sandwich Cable Advisory Committee; David Bruce Cole, Barnstable Cable Advisory Committee; Paul R. Cianelli, New England Cable Television Association, Inc.; David M. Reagan, Plymouth Cable Advisory Committee; and Dave Murphy, Edgartown Cable Advisory Committee.

6. In addition to the oral comments of the above referenced individuals, the Commission received written testimony from the following: Adelphia Communications Corporation ("Adelphia"); Barnstable Cable Advisory Committee ("Barnstable"); Cablevision of Boston, L.P., Cablevision of Brookline, L.P., and A-R Cable Services, Inc. ("Cablevision"); Colony Communications, Inc. ("Colony"); Concord Cable Advisory Committee ("Concord"); Continental Cablevision of New England, Inc. ("Continental"); Greater Media, Inc. ("Greater Media"); City of Lowell ("Lowell"); New England Cable Television Association, Inc., Initial Comments ("NECTA, Initial Comments"); New England Cable Television

Association, Inc., Further Comments ("NECTA, Further Comments"); and Time Warner Cable Entertainment Company, L.P. ("Time Warner").

II. Proposed Revisions

7. The Further Notice followed the Notice of Proposed Rulemaking pursuant to which the Commission adopted procedures for benchmark rate regulation. In the Further Notice, the Commission proposed further procedural refinements to its rate setting regulations and proposed to adopt a Pilot Program pursuant to which up to six (6) communities would be allowed, under Commission authority, to conduct preliminary rate reviews at the local level.

8. This rulemaking was conducted pursuant to the Commission's authority in M.G.L. ch. 166A, § 16. As a result of these proceedings, the Commission has adopted regulations which are consistent with the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the rules promulgated thereunder by the Federal Communications Commission (the "FCC").

III. Procedural Matters

A. State Law Hearing Requirement

1. General

9. Several cable industry commenters argued that no public hearing is required by state law in order for the Commission to make benchmark rate determinations.[1] The basis for these commenters' positions vary; some have taken the position that there are no Constitutional rights implicated by the benchmark rate setting proceeding, some have simply argued that the hearings are unnecessary, and some have stated that although hearings would be necessary for some types of rate regulation, state law does not require a public hearing for benchmark proceedings.

10. The Commission shares the industry's concern that rate regulation be administered in an efficient manner. At the same time, the Commission's procedures must fulfill the requirements of state law. The Commission is not persuaded by the arguments presented that hearings are unnecessary for benchmark determinations. The Commission believes that the enactment of regulations which fail to include a "due hearing" would require it to assume legislative intent for state law and to ignore specific passages of the FCC Report and Order and Further Notice of Proposed Rulemaking, entitled In the Matter of Implementation of Sections of

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[1] Adelphia, p. 4; Colony, p. 4; Continental, p. 11; and NECTA, Initial Comments, pp. 2 - 8.

the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, released May 3, 1993 (the "FCC Report and Order") which address this matter.

2. Paragraph 1 of M.G.L. Chapter 166A, § 15

11. Generally, industry commenters crafted arguments based on the language of two different paragraphs of M.G.L. ch. 166A, § 15 to suggest that public hearings for benchmark rate proceedings are unnecessary. These commenters presented one argument based on paragraph 1 of M.G.L. ch. 166A, § 15 and two arguments based on paragraph 3 of M.G.L. ch. 166A, § 15. The first argument is that, in connection with paragraph 1 of § 15 and benchmark determinations, the Commission will not "fix and establish" rates[2] but rather that the benchmark rate determination is a mechanical, formulaic process. Therefore, these commenters argue, the protection of the hearing referred to in § 15 is not required for a benchmark rate determination.[3]

12. While some commenters stated that benchmark rate calculations are formulaic,[4] several cable operators alluded to or commented on the fact that the benchmark filings are complex in nature.[5] For example, one operator estimated that it spent, for each system, "in excess of 100 hours -- not counting management time -- doing benchmark calculations."[6] Another operator stated that "[w]hile the FCC's benchmark rate regulations are not common carrier regulations, they are similar in nature and presumably will be similar in complexity."[7]

13. The Commission anticipates several areas of the benchmark filings (such as Schedules A, B and C of Part III which deal with such matters as equipment valuation, accumulated depreciation,

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[2] M.G.L. ch. 166A, § 15, paragraph 1, provides in part that the Commission "may, upon its own motion or upon request of any issuing authority or licensee, after due hearing and investigation, fix and establish, for each community antenna television system in the commonwealth, a fair and reasonable rate of return from subscription rates charged to subscribers, said rates to be adequate, just, reasonable and non-discriminatory." (Emphasis added.)

[3] NECTA, Initial Comments, pp. 2 - 6.

[4] Adelphia, p. 4; Continental, p. 9.

[5] Greater Media, p. 4; Time Warner, p. 2.

[6] Time Warner, p. 2.

[7] Greater Media, p. 4.

equipment and salaries associated with installation and equipment, etc.) will require a significant level of inquiry on the Commission's part in order to be certain that cable operators have complied with the regulations established by the FCC. Therefore, the Commission does not view its responsibility with regard to rate regulation (or the potential purview of parties to the proceeding) as a mere mathematical check on the information submitted by cable operators.

14. In addition to its ability to conduct a substantive review of rate filings, the Commission also has the authority in a benchmark proceeding to order a prospective rate reduction, to prescribe a rate or to order a company to issue refunds if it determines that an operator's rates are not within the maximum permitted rate level. Given the considerable authority the Commission has to analyze operators' benchmark rate filings and to revise them as necessary, it disagrees with commenters who believe it will not be fixing and establishing rates in benchmark rate determinations. Although benchmark calculations are necessarily more limited in scope than are common carrier rate regulations, within this scope, a similar level of analysis will be required. The Commission's responsibility under the benchmark rate regulation process is not merely to "rubber stamp" an operator's filing. Rather, the Commission believes it will be fixing and establishing rates for basic cable service within the framework designed by the FCC. The standardized nature of benchmark filings may reduce the Commission's need to order a prospective rate reduction, prescribe a revised rate, or order a refund to subscribers; however, the Commission intends to fully exercise its authority in doing so consistent with state and federal law.

3. Paragraph 3 of M.G.L. Chapter 166A, § 15

15. As mentioned above, industry commenters used the third paragraph of M.G.L. ch. 166A, § 15 to make two arguments that public hearings for benchmark rate proceedings are unnecessary. Paragraph 3 in § 15 of M.G.L. ch. 166A states that "[t]he commission may make, and, at any time, alter or amend, reasonable rules and regulations to facilitate the operation of this section and enforce the application of the rates fixed and established by them, may conduct hearings and investigations under this section, and may at any time, require any company to file with them such data, statistics, schedules, or information as they may deem proper or necessary to enable them to fix and establish or secure and maintain fair and reasonable rates." (Emphasis added.)

a. Flexibility

16. The first argument industry commenters made with respect to Paragraph 3 in § 15 of M.G.L. ch. 166A is that the broader language of paragraph 3 gives the Commission the flexibility to choose not to conduct a public hearing in connection with benchmark

rate determinations.[8] The Commission believes that this statutory language does grant it some level of flexibility in conducting rate regulation; however, the Commission does not read this broader language as limiting the more specific language of paragraph 1 of § 15, which states that the Commission may "after due hearing and investigation, fix and establish. . . a fair and reasonable rate . . . ." (Emphasis added.) Therefore, the Commission interprets state law as requiring a hearing for benchmark determinations.

b. Formal v. Informal Hearings

17. The second argument industry commenters made in connection with the third paragraph in § 15 of M.G.L. ch. 166A is that even if the Commission does conduct hearings in connection with benchmark rate filings, it would not have to conduct formal hearings pursuant to M.G.L. ch. 30A. These commenters based this argument on a reading of M.G.L. ch. 166A, § 19 with which the Commission does not agree.

18. M.G.L. ch. 166A, § 19 requires that "[t]he hearing provided for in section[] . . . fifteen . . . shall be subject to the provisions of chapter thirty A." Commenters urged that the hearing referred to in this section is the hearing described in paragraph 3 of § 15 and not the hearing described in paragraph 1 of § 15. The Commission believes it would be a misreading of § 19 to require M.G.L. ch. 30A procedures to apply to the more general provisions of paragraph 3 of § 15 and not to the specific hearing requirement established by paragraph 1 of § 15. Therefore, the Commission reads § 19 of chapter 166A as requiring that chapter 30A procedures apply to its benchmark rate hearings.

19. Utilizing M.G.L. ch. 30A, the Commission will adopt substitute rules to those developed by A & F.[9] The rules the Commission adopts today and the rules it adopted in the Report and Order portion of the Further Notice are not identical to those adopted by A & F; they are similar but more narrow in scope.

B. Hearing Requirement Not Inconsistent With Federal Law

20. Several cable industry commenters argued that even if state law requires a hearing for a benchmark rate determination,

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[8] NECTA, Initial Comments, p. 4.

[9] M.G.L. ch. 30A, § 9 requires that the commissioner of administration establish standard rules of adjudicatory procedure. Following the establishment of these rules, adjudicatory hearings are to be conducted pursuant to these regulations or, in the alternative, pursuant to rules developed by an agency for its use. A & F has promulgated standard rules of adjudicatory procedure in 801 CMR 1.00 - 1.03.

any such requirement is preempted by federal law.[10] In making this argument, commenters noted that the framework for benchmark rate regulation adopted by the FCC was intended to reduce regulatory burdens on regulators and operators alike.[11] These commenters note that the FCC does not require hearings for benchmark determinations.[12] According to these commenters, by holding hearings in benchmark rate determinations, the Commission is "increasing" the regulatory burden on cable operators and regulators from what was intended by the FCC, and, therefore, the Commission has proposed regulations which, if adopted, would be inconsistent with federal law.[13]

21. Because the Commission's proposed procedures are limited in scope to matters which are relevant to benchmark proceedings, the Commission does not believe they are inconsistent with federal law. The FCC has said in its Report and Order that a hearing is not required in a benchmark rate determination.[14] However, commenters basing their argument that conducting hearings would be inconsistent with federal law on this language failed to acknowledge that the FCC also stated that "[w]e also agree with those parties who believe that local authorities should have the option of providing for formal hearings or informal public meetings or written comments. The Commission thus believes that franchising authorities can decide for themselves whether and when to conduct formal or informal hearings . . . ."[15]

22. This language specifically addresses the preemption argument. The FCC has allowed for rate regulators to determine whether or not to conduct formal hearings for benchmark rate setting purposes. Because conducting formal hearings is not prohibited by federal law, and because the Commission reads state law as requiring these hearings, the Commission is bound to conduct hearings in benchmark rate determinations.

23. The language quoted above from the FCC Report and Order also addresses the concern of several operators that the Commission may risk losing its certification by adopting the proposed regulations because they are not consistent with the regulations

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[10] Adelphia, pp. 5 - 6; NECTA, Initial Comments, p. 9.

[11] NECTA, Initial Comments, p. 9.

[12] NECTA, Initial Comments, p. 11.

[13] Adelphia, pp. 3 - 4; NECTA, Initial Comments, pp. 12 - 15.

[14] See FCC Report and Order, ¶ 126 and ¶ 127.

[15] FCC Report and Order, ¶ 127 (emphasis added).

adopted by the FCC.[16] These commenters cautioned the Commission that it may jeopardize its certification because it is required to certify to the FCC that the regulations it adopts are consistent with those adopted by the FCC.[17] Given the flexibility afforded franchising authorities by the FCC as noted in paragraph 21 above, and finding nothing in the FCC's regulations which precludes a public hearing requirement in connection with benchmark rate determinations, the Commission does not believe its certification will be jeopardized by the regulations it adopts today.

C. Discovery

1. General

24. The Commission's proposed regulations, which were included in the Further Notice, presented discovery procedures pertaining to document requests and interrogatories.[18] The Commission's proposed rules allowed for any party to a rate proceeding to request any other party to make available any documents or tangible items for inspection or photocopying.[19] The proposed regulations also stated that any party could file a motion with the Commission requesting approval to serve written interrogatories on any other party for the purpose of discovering relevant information.[20]

25. Under these proposed regulations, requests for documents or motions for interrogatories could be made following commencement of the rate proceeding.[21] In both the case of document requests and interrogatories, the proposed rules indicated that requested information would be limited to non-privileged information.[22] In addition, the proposed regulations stated that motions for interrogatories would be limited to no more than 30 questions, and the motion would have to be approved by the Commission before

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[16] Adelphia, p. 6; Cablevision, p. 18, footnote 49; Greater Media, p. 5.

[17] Adelphia, p. 6; Cablevision, p. 18, footnote 49; Greater Media, p. 5.

[18] Further Notice, proposed regulations, 6.38(1).

[19] Further Notice, proposed regulations, 6.38(1)(a).

[20] Further Notice, proposed regulations, 6.38(1)(b).

[21] Further Notice, proposed regulations, 6.38(1)(a)(1) and 6.38(1)(b).

[22] Further Notice, proposed regulations, 6.38(1)(a) and (b).

interrogatories could be served on the other party.[23]

26. Cable operators indicated their concern that the Commission's proposed discovery procedures would become burdensome and would serve as a "roving license to rummage around in [cable operators'] confidential business information".[24] Moreover, many cable operators commented that the expediency of benchmark rate determinations would be severely and negatively impacted by the Commission's proposed discovery procedures.[25] For example, Continental stated that the discovery rules "lack any restriction on the issues which can be inquired into - there is no limitation, as there is in rules of civil procedure, requiring that discovery be allowed only with respect to matters 'relevant to the subject matter involved in the pending action'." (Citation omitted.)[26]

27. Local governments, to the limited extent that they commented on this issue, agreed, at least in part, that the right of discovery creates the potential for parties, or intervenors who gain the rights of parties, to slow or hinder rate making proceedings.[27] The single commenter to speak at length on this issue from a local government perspective, Mr. William August, commented in oral testimony that discovery provides a procedural means for the sharing of information. He also stated that the discovery procedures allow parties to have access to relevant information and that they provide parties with a sense of confidence in the ratemaking process. If the Commission were to create a process that would allow cable operators to withhold relevant information, Mr. August asserted, it would invite an atmosphere of cynicism. Further, Mr. August stated that although cable operators are arguing for the elimination of discovery, this could create public cynicism and mistrust that could cast a shadow on the regulated companies as well as on the regulatory process.

28. The regulations that the Commission adopts today are designed to provide for a means of sharing relevant information. Yet, the Commission recognizes that the right of discovery opens the door of ratemaking proceedings to participation by parties whose potential action may not enhance the process. Therefore, the regulations the Commission adopts today retain the rights of parties to conduct discovery, but limit, in several important ways, their ability to abuse these rights.

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[23] Further Notice, proposed regulations, 6.38(1)(b).

[24] NECTA, Further Comments, p. 16.

[25] NECTA, Initial Comments, p. 9; Time Warner, pp. 2 - 8.

[26] Continental, p. 10.

[27] Oral comments of Mr. David Allen.

2. Control of Relevancy

29. The Commission believes that there may be legitimate requests for discovery to substantiate costs associated with benchmark filings or to provide back up data for benchmark filings. The Commission does not agree with commenters who assert that the Commission's discovery regulations turn benchmark proceedings into cost-of-service proceedings.[28] However, benchmark rate determinations (and the discovery related to benchmark rate determinations) are much more limited in scope than are cost-of-service proceedings. General operating expenses, head-end and plant costs, other income, and an extensive list of other data that would be considered and possibly challenged in a traditional cost-of-service hearing are not included in an operator's benchmark rate filing. Thus, the limited scope and the limited subjectivity of this data will likely result in a small number of relevant discovery requests compared to a cost-of-service hearing which raises many questions dealing with cost data.[29]

30. In the proposed rules, the Commission retained control over interrogatory requests, but allowed requests for document production to be made directly between parties.[30] In keeping with the Commission's goal of allowing relevant, but avoiding needless, discovery, it has modified the proposed regulations so that document requests as well as interrogatories will be made through, and controlled by, the Commission. This will allow the Commission to avoid closed-door ratemaking, but it will charge the Commission with the gate keeping responsibility of controlling discovery by parties whose actions would only frustrate the expediency of rate determinations without adding relevant material to the process.

31. The Commission believes that it has a duty to ensure that discovery is limited relevant data. The Commission understands the concern that discovery can be turned into a "roving license to rummage" though a party's business matters. However, the Commission also believes that it is the responsibility of the Commission to carefully and judiciously guard the interests of those who wish to review pertinent information, while also

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[28] For example, Time Warner stated that "[c]ost-of-service showings involve a more detailed review than benchmarks. However, benchmark proceedings will become just as involved as cost-of-service showings under the Cable Commission's proposed regulations concerning pretrial discovery and evidentiary hearings." Time Warner, p. 6.

[29] We add that the extent to which cost-of-service hearings require discovery may be defined by the FCC's forthcoming cost-of-service rules.

[30] Further Notice, proposed regulations, 6.38 (1)(a) and (b).

protecting the rights of parties to provide only material that is relevant to the determination being made. In order to ensure the protection of all parties' rights, and in order to ensure compliance with the FCC's regulations, the Commission will modify its proposed regulations regarding discovery requests by stating that permitted discovery will be limited to matters that are required to be clarified to "ensure that a proposed rate is within a presumptively reasonable level."[31]

3. Timing Issues

32. The Commission believes that the FCC has directly addressed the question, in the affirmative, of whether or not the Commission's procedural requirements for discovery are consistent with FCC regulations. The FCC stated that there is a need for franchising authorities to have some flexibility in adopting rate regulation procedures.[32] In addition, it has stated that "any such rules must provide a reasonable opportunity for consideration of the views of interested parties, and should take into account the time periods that franchising authorities have to act on either initial review of basic cable rates or requests for increases."[33]

33. While the Commission does not agree with commenters who assert that giving parties rights of discovery is inconsistent with federal law, it is concerned about related questions as to its regulations' impact on the timing of decisions. The Commission's proposed regulations for discovery stated that requests for documents and motions for interrogatories could be made after the commencement of the rate proceeding, and that responses to these requests and motions would be made within 30 days unless the Commission otherwise specified.[34]

34. A number of cable operators stated concerns about the timing of discovery requests and the resulting impact discovery requests could have on the timing of rate determinations. Time Warner stated that its "experience in completing benchmark calculations alone raises some doubt over whether the Cable Commission can conduct its review of benchmarks within the required time."[35] In its comments, NECTA stated that "the Commission will be hard-pressed to complete any benchmark determinations before 120

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[31] FCC Report and Order, ¶ 121.

[32] FCC Report and Order, ¶ 125.

[33] FCC Report and Order, ¶ 125.

[34] Further Notice, proposed regulations, 6.38(1)(a) and (b).

[35] Time Warner, p. 3.

days have elapsed. Multiply these proceedings over 200 times and the Commission cannot hope to complete review of one year's rates in the time required, much less get started on succeeding years' new rates."[36] In addition, Adelphia's comments stated that "it is possible that with the extensive discovery and hearing requirements of the proposed regulations, the Commission will be unable to complete benchmark methodology reviews within the 120 days as required."[37]

35. The Commission cannot dismiss these concerns, and it believes that its rate review procedures must recognize these potential problems. Just as the Commission needs to be able to control discovery requests to ensure that irrelevant matters do not side-track the process, so too does the Commission need to place limits on the timing of requests for discovery if it wishes to adhere to the FCC's time guidelines.

36. Recognizing the potential problems raised by commenters, the Commission has modified the proposed regulations in two important ways. First, the Commission has clarified that a discovery request cannot be made prior to the filing of an operator's rate filing. Because discovery requests in benchmark determinations must be related to matters dealing with benchmark filing data, requests for discovery shall take place following the operator's benchmark filing. Second, the Commission has qualified its discovery regulations by stating that the Commission's review of document requests or motions for interrogatories will attempt to balance their likelihood of contributing to the process by revealing relevant data with their impact on the time guidelines established by the FCC for benchmark reviews.

D. Proprietary Information

1. Introduction

37. Several cable operators, in their written comments, questioned the access to proprietary information of parties other than the Commission.[38] These operators expressed both general concerns about the Commission's procedures to protect proprietary information when it conducts rate regulation wholly at the state level, and specific objections with respect to the handling of

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[36] NECTA, Initial Comments, p. 13.

[37] Adelphia, p. 5.

[38] Cablevision, pp. 15 - 16; Continental, p. 10; NECTA, Further Comments, pp. 16 - 20.

proprietary information in connection with the Pilot Program.[39]

38. In the FCC Report and Order, the FCC clarified that even if information is proprietary, it must still be supplied to franchising authorities. In fact, the FCC also made a specific reference to confidential information with regard to equipment costs when it stated that "confidential financial information may be collected and utilized to determine equipment costs."[40] As indicated previously, the Commission believes the equipment portion of the benchmark rate determination to be a particular area in which additional (and potentially proprietary) information will be requested. However, the FCC has also stated that "franchising authorities must protect confidential business information from disclosure. To accomplish this goal, [the FCC] will require franchising authorities to apply the same procedures that the [FCC] will apply regarding information submitted to the [FCC] in the cable programming services complaint processes. . . ."[41] Therefore, in the Report and Order portion of the Further Notice, the Commission adopted regulations regarding proprietary information.[42]

2. Procedural Aspects of Requests for Confidentiality

39. The Commission believes that it has adopted regulations consistent with the FCC's regulations regarding the handling of proprietary information. However, it also believes that it would be helpful in this Report and Order to describe, in greater detail, the procedures of the FCC's regulations regarding proprietary information which, pursuant to 207 C.M.R. 6.40, the Commission must follow.

40. The FCC's regulations provide that any request that material not be made available for public inspection, must be attached to and cover all materials to which it applies.[43] If possible, the confidential materials should be physically separated from all non-confidential materials.[44] If this separation is not possible, the confidential materials must be specifically

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[39] The issue of Pilot Program Issuing Authorities and proprietary information is discussed below at paragraphs 76 through 78.

[40] FCC Report and Order, footnote 347.

[41] FCC Report and Order, ¶ 131.

[42] Further Notice, 207 CMR 6.40.

[43] 47 C.F.R. § 0.459(a).

[44] 47 C.F.R. § 0.459(a).

identified.[45] Federal regulations also require that each request shall contain a statement of the reasons for withholding the materials from inspection, and the facts upon which these reasons are based.[46] Casual requests for confidentiality not complying with the provisions of 47 C.F.R. § 0.459 (a) and (b) shall not be considered; the material will automatically be considered available to the public.[47]

41. Properly prepared requests will be acted upon by the Commission pursuant to 47 C.F.R. § 0.459(d). The test for determining confidentiality is described in 47 C.F.R. § 0.457(d)(2)(i) and 47 C.F.R. § 0.459(d); if the request demonstrates by a preponderance of the evidence that the materials submitted contain trade secrets or commercial, financial or technical data which would customarily be protected from inspection by competitors, the material will not be made routinely available for inspection. If the request for confidentiality is granted, the ruling will be placed in the public file.

42. Pursuant to federal regulations, if no request for confidentiality is submitted, the Commission will assume no obligation to consider the need for non-disclosure but it may determine on its own motion that the materials should be withheld from public inspection.[48]

43. FCC regulations provide for an appeal process. If a request for confidentiality is denied, then within 5 working days, an application for review may be filed with the FCC.[49] If an application for review is denied by the FCC, the person seeking the confidential treatment of material may, within 5 working days, seek judicial stay of the ruling.[50] If no action is taken by the person making the request within these time periods, the material will be placed in the public file, or else returned.[51]

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[45] 47 C.F.R § 0.45(a). However, certain cable television financial reports and annual fee compensation forms to the FCC do not require a request in order to be withheld from disclosure. 47 C.F.R. §0.457(d)(1).

[46] 47 C.F.R. § 0.459(b).

[47] 47 C.F.R. § 0.459(c).

[48] 47 C.F.R. § 0.459(f).

[49] 47 C.F.R. § 0.459(g).

[50] 47 C.F.R. § 0.459(g).

[51] 47 C.F.R. § 0.459(g).

44. Therefore, the mere assertion by a party that information is proprietary will not be sufficient to allow that party to protect it from disclosure. The specific procedures provided for by federal regulations and incorporated into the Commission's regulations must be followed by all parties involved.

3. The Limited Scope of M.G.L. Chapter 166A, § 8

45. Several commenters interpreted M.G.L. ch. 166A, § 8 to have general applicability to all Commission activities.[52] Continental interpreted this provision as a general determination that "financial statements of cable operators' revenues and expenses must be for official use only - i.e., not public records."[53] NECTA observed that "under [M.G.L. ch. 166A, § 8] information about 'revenues and expenses' -- exactly the kind of information that would be provided in a rate proceeding -- is provided to the Commission only and for official use only."[54]

46. However, the Commission's review of this question finds M.G.L. ch. 166A, § 8 is not the only section which requires the submission of financial data to the Commission. The third paragraph in § 15 of M.G.L. ch. 166A states: "[the Commission] may at any time require any company to file with it such data, statistics, schedules or information as it may deem proper or necessary to enable them to fix and establish or secure and maintain fair and reasonable rates." There is no provision in M.G.L. ch. 166A, § 15 directing the Commission to keep this information confidential. Nor is there any general provision in Chapter 166A with respect to the confidentiality of financial data. The Commission finds that M.G.L. ch. 166A, § 8 expresses no general policy; it is limited only to a specific annual filing of revenues and expenses on forms prescribed by the Commission. Therefore, the Commission finds that the statutory restrictions placed on § 8 filings do not apply to other instances where financial data may be requested by the Commission, such as in a rate proceeding.

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[52] Continental, p. 10; NECTA, Further Comments, pp. 16 - 20. M.G.L. Ch. 166A, § 8 provides in part: "Each licensee shall file annually with the Commission on forms prescribed by the commission, a statement of its revenues and expenses for official use only. In addition, each such licensee shall file with the commission and the issuing authority on forms prescribed by the commission, a financial balance sheet and statement of ownership which shall be open to public inspection."

[53] Continental, p. 10.

[54] NECTA, Further Comments, p. 16.

4. Issuing Authorities' Access to Proprietary Information

47. In the regulations adopted by the Commission in the Report and Order portion of the Further Notice, the Commission required cable operators to provide proprietary information to issuing authorities "[t]o the extent consistent with federal and state laws and regulations, and subject to confidentiality . . . ."[55] Some commenters objected to the issuing authority's access to proprietary information.[56] Under Massachusetts' system of cable television regulation, both local issuing authorities and the Commission play major roles. Although the Commission is the regulator of basic cable rates in Massachusetts, in its Further Notice, the Commission found it essential that local issuing authorities also participate in the ratemaking process. In order to do so, and to encourage confidence in the process of rate regulation, the Commission believes it is important for local issuing authorities to have access to cable operators' filings with the Commission, including proprietary materials (other than those specifically restricted by M.G.L. ch. 166A, § 8).

48. In addition, it should be noted that the federal regulations discuss proprietary information as material which "will not be made routinely available for inspection."[57] The Commission does not believe that releasing to parties proprietary material and simultaneously requiring them to abide by the same regulations the Commission must follow with regard to this material would be considered to be making this information routinely available for public inspection.

49. If proprietary material in a rate filing is submitted to the Commission with a request that it not be available for public inspection under 47 C.F.R. § 0.457(a), and it is simultaneously submitted to a local issuing authority pursuant to 207 CMR 6.33 of the Commission's rules, the local issuing authority must safeguard this material from improper inspection during the Commission's review of the request for confidentiality. If the regulations adopted by the Commission prove to be insufficient to protect operators in benchmark rate proceedings, the Commission will make further revisions to its regulations.

E. Intervenor Status

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[55] Further Notice, 207 CMR 6.40.

[56] Cablevision, p. 16; Continental, p. 10; NECTA, Further Comments, p. 16.

[57] 47 C.F.R. § 0.457 (d)(2)(i).

1. Timing of Filing Petition

50. The Commission's proposed regulations allow a potential intervenor to file a petition to intervene "at any time following the commencement of the rate proceeding, but in no event, later than the date fixed by the Commission."[58] In its comments, NECTA suggested that the timing for filing a petition for intervention should be "not less than seven days prior to the date of hearing."[59] The Commission agrees that this deadline for filing is reasonable and, therefore, will incorporate it into the final regulations.

2. Content of Filing

51. The Commission's proposed regulations required that a petitioner for intervention include in its petition "the manner in which the person making the request is affected by the proceeding" including "why the intervention or participation should be allowed . . . ."[60] In addition, the Commission's proposed regulations stated that "[i]ntervenors shall be persons substantially and specifically affected by the proceeding."[61]

52. In its comments, NECTA proposed that the petition for intervention should include more specific requirements regarding the content of the petition and the nature of the interest of the potential intervenor.[62] Specifically, NECTA proposed that the Commission require the petition for intervention to include qualifying language about the interests of the potential intervenor, an indication of the manner in which the potential intervenor seeks to participate in the proceeding, and a description of the issues the potential intervenor anticipates addressing. The Commission finds NECTA's proposal to include these standards appropriate requirements for a party petitioning for intervention and consistent with the requirements of M.G.L. ch. 30A. Therefore, the Commission has incorporated this proposed language into its final regulations.

3. Standard of Review of Filing

53. Finally, in connection with intervenor status, the Commission's proposed regulations stated only that "[a]ny person

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[58] Further Notice, proposed regulations, 6.38(2)(c).

[59] NECTA, Further Comments, proposed regulations, p. 8.

[60] Further Notice, proposed regulations, 6.38(2)(b).

[61] Further Notice, proposed regulations, 6.38(2)(d).

[62] NECTA, Further Comments, proposed regulations, pp. 8 - 9.

not initially a party who, with good cause, wishes to intervene . . . shall file with the Commission a written request for leave to intervene . . . ."[63] NECTA proposed including a more specific standard for the Commission to use in deciding whether or not to grant a petition for intervention. Among other things, this proposed language would allow the Commission to deny intervention if the intervention would provide repetitive or irrelevant material, and would allow the Commission to limit the number of intervenors and participants in any proceeding. The Commission has concluded that establishing such a standard in its final regulations will be helpful to the Commission and to potential intervenors and, therefore, it has incorporated NECTA's proposed language into its final regulations.

F. Summary

54. The record before the Commission in this rulemaking was largely comprised of comments from cable operators. Their comments urged the Commission to develop regulations that would not require a formal public hearing in benchmark rate determinations. Many of these commenters, while raising concerns about public hearings, appear to be more averse to the attendant functions of formal hearings (such as rights of discovery) than with the hearings themselves.

55. To the extent that local government commenters addressed the Commission's proposed procedural regulations, they identified that they, like the cable industry, would not want to see the Commission develop a framework that would create an unnecessarily drawn-out ratemaking process. Further, the Commission acknowledges that it too seeks to avoid an overly procedural regulatory structure as it is the entity that could be most encumbered by a burdensome process.

56. In order to reduce the burdens created by this process, the Commission has revised numerous portions of its regulations and proposed regulations so that they can be administered in an efficient manner and in a manner that will meet the time guidelines established by the FCC. Specifically, the Commission limited the scope of procedural review by:

(a) modifying the proposed regulations so that document requests as well as interrogatories will be made through, and controlled by, the Commission;

(b) clarifying that a discovery request cannot be made prior to the submission of an operator's rate filing;

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[63] Further Notice, proposed regulations, 6.38(2)(a).

(c) clarifying that discovery requests will be evaluated for their likelihood to produce relevant data;

(d) modifying the proposed discovery regulations by stating that the Commission's review of document requests or motions for interrogatories will be weighed against the impact that the request or motion has on the time guidelines for benchmark reviews;

(e) determining that the timing for a filing of a motion to intervene may not be made less than seven days prior to the date of hearing; and

(f) developing a more specific standard for the Commission to use in deciding whether or not to grant a petition for intervention.

57. While the Commission has streamlined its procedural regulations, it has not eliminated the hearing requirement. In reviewing the record and in reviewing state and federal law, the Commission finds that it is not persuaded by the arguments presented that, under state law, hearings are unnecessary for benchmark determinations. Nor is the Commission persuaded by the argument that conducting such hearings is inconsistent with federal law. It can be argued that removal of the hearing requirement would make for more expedient rate determinations, yet the Commission believes that enactment of regulations that fail to include a due hearing would require it to ignore state law. Therefore, as discussed in paragraph 19, the Commission is adopting substitute rules to those developed by the Executive Office of Administration and Finance ("A & F") and it will conduct rate hearings that generally will be held in Boston on a consolidated basis.

IV. Pilot Program

A. Alleged Lack of Notice

58. At least one commenter has argued that the Commission's adoption of the Pilot Program is procedurally flawed because the Commission adopted the program without notice and opportunity for comment by the industry.[64] The cases cited to support this argument are all cases heard in federal courts applying the federal Administrative Procedures Act. The Commission is not a federal agency. However, even under the federal Administrative Procedures Act, courts have held that the notice requirement is satisfied as long as the final regulations are a "logical outgrowth" of the

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[64] NECTA, Further Comments, pp. 2 - 5.

proposed regulations.[65] In addition, the focus of this test is whether or not a party should have anticipated that such a requirement might be imposed.[66] Further, the notice must only include a description of the subjects and issues involved and must provide a reasonable opportunity to participate in the rulemaking.[67]

59. While the Commission is not bound by the provisions of the federal Administrative Procedures Act, it is bound by the provisions of M.G.L. ch. 166A, § 16, the State Administrative Procedure Act in M.G.L. ch. 30A and by its own regulations regarding the adoption of regulations, 207 CMR 2.00, et seq. The regulations regarding the Pilot Program were proposed in the Further Notice. The Commission conducted a series of four public hearings relative to the regulations proposed in the Further Notice. The Commission gave notice of the public hearings as is required by its regulations in 207 CMR 2.06. The text of the notice referenced both the proposed procedural standards and the proposed Pilot Program.

60. By placing reliance on the July 27, 1993 Notice of Proposed Rulemaking, the Commission believes NECTA's argument that there was insufficient notice of the Pilot Program to be flawed. The relevant notice for the Pilot Program regulations was the notice published by the Commission in connection with the Further Notice. In connection with the Further Notice, the Commission complied with all applicable notice requirements under state law and its regulations.

B. Preemption Does Not Preclude Adoption of the Pilot Program

1. Commission's Authority to Adopt Pilot Program

61. The Commission stated, in the Report and Order portion of the Further Notice, that it did not concur with the opinion of some local government commenters that Massachusetts' local governments had the right to determine rates for cable television.[68] In addition, the Commission documented that the FCC Report and Order

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[65] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking entitled In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, Released August 27, 1993, (the "FCC First Order"), ¶ 17 and cases cited therein.

[66] FCC First Order, ¶ 17 and cases cited therein.

[67] FCC First Order, ¶ 17 and cases cited therein.

[68] Further Notice, ¶ 10.

stated that, under current law, the Commission is the appropriate regulator of cable television rates in Massachusetts.[69] The Commission stated that it "agrees with the FCC that, under current law, the Commission is the governmental entity authorized to regulate rates in the Commonwealth."[70] The Commission also stated that its rules "do not and could not change the state statute which delegates rate regulation to the Commission."[71] Yet, while the Commission stated that it could not delegate its responsibility to ultimately determine rates, it indicated, in the Further Notice, that it was proposing rules for a Pilot Program which would re-introduce, on a limited basis, the Commission's previously used two-step regulation in which "local governments made an initial determination and the Commission reviewed and either approved or altered the local government's decision."[72]

62. The Commission's proposed rules for a Pilot Program were questioned by several cable operators who believe this to be an illegal transfer of authority from the Commission to local governments.[73] The Commission's review of these questions raised by cable operators clarifies both its authority to enroll local governments in the Pilot Program and that its regulations are not inconsistent with state or federal law.

63. It is well established, as a matter of state law, that the Commission has the authority to adopt a two-step rate making process.[74] Although state law allows for a two-step rate

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[69] Further Notice, ¶ 10.

[70] Further Notice, ¶ 10.

[71] Further Notice, ¶ 13.

[72] Further Notice, ¶ 12.

[73] Cablevision, pp. 3 - 8; NECTA, Further Comments, pp. 8 - 9.

[74] In Warner Cable of Massachusetts, Inc. v. Community Antenna Television Comm'n, 372 Mass. 495 (1977), Warner challenged the Commission's then-existing regulations as improperly allowing local governments to be involved in the ratemaking process in a manner not anticipated by M.G.L. ch. 166A, § 15, which assigned rate regulation responsibility to the Commission. The Commission's regulations at that time allowed local governments to conduct the first step of rate regulation and to conduct a public hearing on the local level. The court in that case found that, although there was no statutory provision expressly authorizing the two-step procedure, the Commission had broad power to make regulations to facilitate the operation of § 15. The regulations were upheld because, in the court's words, despite the adoption of the two step process, "[t]here was . . . no relinquishment of control or

regulation process, commenters argued that federal law and the FCC's regulations do not allow for the enlistment of local governments for the determination of rates, as proposed by the Pilot Program.[75] Cablevision stated that "[b]ecause the pilot program, by its own terms, aims to convey rate-setting power to non-franchising authorities, it violates the 1992 Cable Act."[76] Cablevision also argues that "the Commission cannot delegate such information-collection powers to local issuing authorities, because they are expressly reserved to franchising authorities by the 1992 Act."[77] Further, Cablevision argues that "local issuing authorities are neither franchising authorities nor would they be certified by the FCC."[78]

64. The Commission believes that these arguments and other similar arguments are misplaced. As stated above, the Pilot Program does not make local governments the final determining body for basic service tier rate regulation; the Commission retains full authority and responsibility for determining rates through its ability to review the issuing authority's report and to conduct a de novo hearing.

65. As a practical matter, few certified franchising authorities in other states will collect information entirely on their own without the assistance of their staff, relevant governmental agencies, or outside consultants. In Massachusetts' case, the Commission is relying on issuing authorities who are statutorily recognized as agents of the state for purposes of regulating cable television.[79]

66. Therefore, the Commission believes that it has the authority, under state law, to enlist local issuing authorities and it further believes that engaging local issuing authorities in the rate regulation process in this manner does not violate federal law

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abnegation of duty by the Commission . . . ." 372 Mass. 495, 504 (1977).

[75] Cablevision, pp. 3 - 8; NECTA, Further Comments, pp. 8 - 9.

[76] Cablevision, p. 6.

[77] Cablevision, p. 7.

[78] Cablevision, p. 9.

[79] The FCC stated that franchising authorities can rely on outside consultants when determining cost-of-service rates; however, "if the franchise authority is going to rely on the consultant's analysis as a basis for the franchise authority's decision, then it must formally adopt the consultant's findings as its own." FCC Public Notice, May 13, 1993, answer to question 12.

requirements.

2. Pilot Program's Impact on the Timing of Decisions

67. Cable operators who are concerned about the expediency of the Commission's regulations, amplified their concerns in their comments on the Pilot Program's impact on the timing of rate determinations.[80] Cablevision, for example, stated that "contrary to the FCC's rules, the Commission's proposed rules require pilot program localities to conduct a hearing on an operator's rates within 45 days of the operator's rate filing. . . . Thus, under the pilot program, every rate filing would trigger an automatic extension of the 30-day deadline in order to allow localities their full 45 days to conduct a hearing and issue a report. As a result, a cable operator's right to prompt implementation of a facially reasonable rate structure would be infringed."[81]

68. Cablevision further stated that "under the pilot program, it is unlikely that the franchising authority will have even looked at the operator's rate structure prior to the grant of a deadline extension. . . . It is likely, moreover, that the extension will be granted solely to effectuate the local hearing, which is not a proper basis for an extension."[82]

69. While the Commission is satisfied that the authority to institute a Pilot Program is consistent with state and federal law, it recognizes that if the Pilot Program frustrates the FCC's time frame guidelines for determining rates, it may be inconsistent with federal law. However, the Commission believes it has structured the Pilot Program to avoid this problem, and has no a priori reason to believe that it will necessarily frustrate the FCC's time frame guidelines.

70. The Commission's proposed regulations for the Pilot Program called for enrolled local governments to review rates consistent with Commission regulations, yet the two-step nature of the Pilot Program's rate reviews introduces specific time frames that are designed to allow local governments ample opportunity to review rates, while allowing the Commission required time to review the findings of the local government. These proposed time frame requirements were as follows: 1) an issuing authority would be required to conduct a public hearing no more than 45 days after the

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[80] Cablevision, p. 9

[81] Cablevision, p. 9.

[82] Cablevision, p. 10.

operator's filing[83]; 2) an issuing authority would be required to complete its report within 30 days of the public hearing[84]; 3) the Commission would be required, within 45 days of receipt of the report, but no sooner than 21 days, to act on the issuing authority's report[85].

71. In a related matter dealing with timing, Mr. David Cole, in oral testimony at the public hearing in Falmouth, suggested that issuing authorities participating in the Pilot Program would not require 45 days in which to conduct a public hearing. He stated that 30 days would be a sufficient time period during which to conduct these hearings. In addition, he asserted that the time frame for an issuing authority to complete its report could be tied to the date of the cable operator's rate filing.

72. In consideration of Mr. Cole's comments, the Commission has revised its proposed regulations to require issuing authorities participating in the Pilot Program to complete their report to the Commission within 75 days of the operator's filing of its rates with the Commission. Thus, if the issuing authority holds its public hearing prior to Day 45, it would have more time to draft its report than would have been allowed under the proposed regulations which required the submission of the report within 30 days of the commencement of the hearing.

73. The Commission believes that the above defined time frames create a program that can operate within FCC determined time guidelines. However, the Commission enters the Pilot Program knowing that it has a responsibility for ensuring that discovery, Commission review, and other matters do not frustrate the FCC's time frames, and the Commission believes that it will re-visit this issue as it evaluates the success of the Pilot Program.

C. Discovery

74. As is discussed above in Section III(C), many cable industry commenters are uncomfortable with the Commission's ability to control the discovery process once it is in place. In connection with the Pilot Program, many of these same commenters have expressed additional concern about the Pilot Program participants' ability to control the discovery process.

75. The Commission has a general concern and a very real interest in Pilot Program participants following the guidelines for the benchmark rate setting process which are established by state

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[83] Further Notice, proposed regulations, 6.60(6).

[84] Further Notice, proposed regulations, 6.60(7).

[85] Further Notice, proposed regulations, 6.60(8).

and federal law and regulations. All interested parties should note that Pilot Program participants will be bound to enforce the same relevancy and other standards the Commission will enforce with regard to the discovery process.

D. Proprietary Information

76. Under the Pilot Program, the participating issuing authorities will be able to request proprietary information from cable operators. However, as with discovery requests generally, these issuing authorities will be required to follow the same procedures described in 47 C.F.R. § 0.459.

77. The appeal procedures of 47 C.F.R. § 0.459(g), as described in paragraph 43 above, would be applicable in the Pilot Program. An appeal by a cable operator would be made first to the Commission. As in the case of a rate case heard by the Commission, an appeal from the Commission's decision would go to the FCC.

78. The Commission wants to emphasize that should material be submitted to a local issuing authority, with the request that it be withheld from public inspection pursuant to 47 C.F.R. § 0.459(a), that during the period this request is being considered and/or appealed, the issuing authority must safeguard this material from improper inspection.

E. Effective Date

79. The Commission has revised the date by which communities should request participation in the Pilot Program because its regulations adopting the Pilot Program will not become effective until they are published in the Massachusetts Register on December 31, 1993. Therefore, the Commission will be accepting requests for participation through January 14, 1994.

F. Selection Criteria

80. In its proposed rules, the Commission stated that it would select up to, but no more than, six communities "based on: a) their apparent ability to conduct rate regulation on their own; and b) the extent to which the sample size will represent a cross section of communities."[86]

81. Time Warner suggested, in its written comments, that "the cities and towns involved in [Pilot Program] rate regulation will be those large enough to afford technically competent regulatory staffs. If the Cable Commission's purpose is to establish some kind of representative record from cities and towns, this small

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[86] Further Notice, proposed regulations, 6.60(4).

group of cities with such staffs will hardly be representative of the body of issuing authorities in Massachusetts."[87] Greater Media apparently concurs with this interpretation as it stated that in order to guarantee Pilot Program success, "the Commission is only permitting participation by those communities which are best prepared to handle the rate making procedures. Thus, the record will reflect the best possible scenario and not a realistic picture of how other communities, not as well prepared, but eager to participate, will fare when they begin to regulate."[88]

82. Commenting on the same matter, but with a different perspective, Barnstable urged that "[i]n establishing criteria for enrollment in the Pilot Program, preference should be given to those municipalities with a demonstrated past history in rate matters."[89] Barnstable also stated that "any community participating in the Pilot Program should have the necessary legal, technical and financial expertise available."[90]

83. The Commission recognizes the legitimate concerns raised by Time Warner and Greater Media, and it will therefore not limit consideration to those communities which are best prepared to regulate; yet, it will also heed Barnstable's advise and it will make an effort to make sure that those who are most capable to regulate are included in the Pilot Program. By selecting Pilot Program participants in a manner that provides a "sample size [that] will represent a cross section of communities" as directed by its proposed regulations,[91] the Commission will be able to achieve the representative record and one that avoids the potential pitfalls alluded to by the above mentioned parties.

84. To the extent that communities cannot indicate a minimum showing of the legal, technical, and administrative capabilities for rate regulation, they will not be enrolled into the Pilot Program.

G. Regional Pilot Program Participation

85. Mr. William Bean of the Four Town Cable Advisory Committee and Mr. David Pandolfi of the West Springfield Cable Advisory Committee raised the question of whether or not "regional"

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[87] Time Warner, p. 12.

[88] Greater Media, p. 4.

[89] Barnstable, p. 1.

[90] Barnstable, p. 1.

[91] Further Notice, proposed regulations, 6.60(4).

cable advisory committees would be allowed to jointly enroll it the Pilot Program. In considering this question, the Commission notes that under state law, these regional bodies are not recognized. However, the Commission has, in the past, encouraged the informal formation of these types of bodies and has submitted legislation that would allow for regional issuing authorities. The Commission will, therefore, allow those communities that demonstrate a past record of joint regulatory activity to seek enrollment in the Pilot Program as a consolidated entity.[92] The Commission will consider the appropriateness of allowing the entities into the Pilot Program at the time of its selection review.

H. Commission Assistance for Pilot Program Participants

86. The concept of a Pilot Program was developed at least in part to "provide the Commission and issuing authorities with a record that will assist in the determination of the best way to proceed in the future with rate regulation in those communities that wish to regulate rates at the local level."[93] In that context, the Commission hopes to gather evidence from the Pilot Program as to how communities will fare regulating rates with little involvement on the part of the Commission.

87. A question that has arisen in a general way concerning the Pilot Program is the degree to which the Commission will provide assistance to Pilot Program communities. In considering this question, the Commission is mindful of its appellate function over the decisions of the local issuing authorities participating in the Pilot Program. In assisting Pilot Program participants, the Commission will be careful not to become involved in the local process in a way which would jeopardize its objectivity in reviewing the issuing authority's rate report.

88. At the same time, and balancing these concerns, is the Commission's desire not to institutionally sabotage the potential success of the Pilot Program by refusing to assist Pilot Program communities. Therefore, the Commission is likely to provide some assistance to Pilot Program communities but the level of assistance is likely to be quite limited. However, the Commission will make available to Pilot Program participant communities the computer software it has developed to help it analyze benchmark filings. In addition, the Commission will provide at least generalized direction or guidelines in whatever other format it deems appropriate (i.e., written material, etc.).

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[92] In the alternative, any community requesting joint or regional participation in the Pilot Program could also apply to participate on an individual basis.

[93] Further Notice, ¶ 75.

I. Timing of Involvement

89. Some communities have inquired as to the timing of their involvement in the Pilot Program. For many communities, the commencement of the Pilot Program will be too late for their involvement in the first round of rate regulation. The Commission does not believe it would be feasible to transfer the rate regulation process to a local community after the commencement of the process. Therefore, any community which already has requested rate regulation which also becomes a participant in the Pilot Program will not participate in the first round of rate regulation.

J. Standard of Review

90. In the Further Notice, the Commission asked for comments as to whether or not it could conduct a review of an issuing authority's rate report which was more limited than a de novo review.[94] If commenters believed the Commission's review could be more narrow, the Further Notice requested comment on what standard of review would be appropriate for the Commission to use. [95]

91. Two commenters have offered opinions in response to this inquiry.[96] Barnstable has argued that to require a de novo proceeding would be "a slap in the face to the municipalities participating in the Pilot Program . . . ."[97] Continental, on the other hand has argued that the Commission "must" conduct a hearing de novo in considering a Pilot Program participant's issuing authority report.[98]

92. Under the Commission's previous system of rate regulation, the Commission could, after the issuing authority filed its report, either issue a Certificate of Verification or not. If it issued the Certificate of Verification, it also adopted and "made final" the issuing authority's report and findings in connection with the rate proceeding. If the Commission did not issue a Certificate of Verification, it was because the operator, in effect, appealed the issuing authority's decision contained in the issuing authority report, or because the issuing authority's findings were either not "in accord with the standard of a fair and reasonable rate" or there was a failure to comply with the

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[94] Further Notice, ¶ 105.

[95] Further Notice, ¶ 105.

[96] Continental, pp. 6 - 8; Barnstable, p. 2.

[97] Barnstable, p. 2.

[98] Continental, p. 7.

procedures set forth in the regulations.[99]

93. As discussed above, the court in Warner, upheld this method of rate regulation as being consistent with the Commission's authority found in M.G.L. ch. 166A.[100] In part it found that "[t]here was . . . no relinquishment of control or abnegation of duty by the Commission, as the regulations not only call for a hearing de novo when the licensee disagrees with the report of the issuing authority, but oblige the Commission to review and to approve or disapprove a report by the issuing authority even where the licensee acquiesces in it."[101] The Commission, therefore, retains the de novo review requirement.

K. Pilot Program Communities May Regulate Beyond the Initial 12 Months of the Pilot Program

94. The Commission's proposed rules stated that 12 months after the start of the Pilot Program, the Commission would conduct a study and review of the Pilot Program and would issue a Notice of Proposed Rulemaking based on these findings, no later than 15 months after commencement of the Pilot Program.[102]

95. In oral testimony before the Commission, Ms. Mary Schumacher stated her concern that the Commission's proposed regulations were unclear as to whether or not communities that were enrolled in the Pilot Program would be able to continue to regulate following the initial twelve month period, but prior to the Commission's issuance of its Report on Pilot Program Findings and its Notice of Proposed Rulemaking.

96. The Commission clarifies that, barring some other action by the Commission, communities that are enrolled in the Pilot Program will be able to continue to regulate rates while the Commission conducts its assessment of the Pilot Program. In addition, Pilot Program communities will be able to regulate, under the regulations the Commission adopts today, unless waived, until the effective date of the new rules that would emerge from the Notice of Proposed Rulemaking that is to follow the Commission's Report on Pilot Program Findings.

L. Report on Pilot Program Findings

97. In another matter related to the Pilot Program report,

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[99] 207 CMR 6.06.

[100] 372 Mass. 495 (1977).

[101] 372 Mass. 495, 504 (1977).

[102] Further Notice, proposed regulations, 6.60(11).

David Cole, in oral testimony before the Commission, suggested that the New England Cable Television Association, Mass-NATOA, and the Commissioner could be responsible for the development of the Report on Pilot Program Findings. The Commission agrees with the spirit of this suggestion, which was to obtain meaningful input from parties outside of the Commission. Therefore, the Commission shall request the New England Cable Television Association and Mass-NATOA to make, at their discretion, joint or separate reports to the Commission, no earlier than 10 months and no later than 12 months following implementation of the Pilot Program. However, the Commission retains its responsibility for the Report on Pilot Program Findings and the Notice of Proposed Rulemaking as the Commission does not believe that it should delegate this responsibility.

V. Order

98. Accordingly, after due notice and hearing, it is hereby,

ORDERED: That the Commission's current regulations in 207 CMR 6.00 through 6.86 are hereby amended by the regulations adopted in this Report and Order and shall be effective upon publication in the Massachusetts Register.

By Order of the Community Antenna Television Commission

John M. Urban, Commissioner

December 17, 1993

REGULATIONS

COMMUNITY ANTENNA TELEVISION COMMISSION

207 CMR 6.38: PROCEDURAL MATTERS

207 CMR 6.60: PILOT PROGRAM

207 CMR 6.86: SEVERABILITY

207 CMR 6.38: PROCEDURAL MATTERS

(1) Scope. The following procedures shall govern rate proceedings conducted by the Commission. However, the Commission shall strive to conduct such rate proceedings in a manner which is as informal as may be reasonable and appropriate under the circumstances while ensuring the rights of all parties are protected.

(2) Discovery.

(a) Requests for Documents. Any party to a rate proceeding may file a motion with the Commission requesting approval to serve a written request on any other party to make available for inspection or photocopying any relevant documents or tangible items, not privileged, to the extent permissible under state and federal law. No motion requesting approval to request production of such documents or tangible items may be served prior to the time the operator makes its rate filing with the Commission. For purposes of 207 CMR 6.38, a document shall be considered "served" when placed in the U.S. mail, first class postage prepaid.

1. Procedure. The motion shall set forth the items to be inspected individually or by category with reasonable particularity. The party upon whom the request is served shall respond within 30 days unless the Commission has established a shorter time period. A copy of any such response shall be filed with the Commission at the time it is delivered to the requesting party.

2. Agency Costs. If a request for production is served upon the Commission or an issuing authority, it shall be entitled to collect a reasonable fee per page for any documents it produces.

(b) Interrogatories. Any party to a rate proceeding may file a motion with the Commission requesting approval to serve written interrogatories on any other party for the purpose of discovering relevant information, not privileged, to the extent permissible under state and federal law. No motion requesting approval to serve written interrogatories may be served prior to the time the operator makes its rate filing with the Commission. No party, without specific approval of the Commission, shall serve more than 30 interrogatories including subsidiary or incidental questions.

1. Answers to Interrogatories. Each interrogatory shall be separately and fully answered under the

penalties of perjury. Such answers shall be filed with the moving party and the Commission within 30 days of receipt of the interrogatories or such other time as the Commission specifies.

2. Stipulations. In the discretion of the Commission, the parties may, by written stipulation filed with the Commission at any stage of the proceeding, or by oral stipulation made at the hearing, agree upon any pertinent facts in the proceeding. In making its findings, the Commission need not be bound by any stipulation which is found to be in contravention of law or erroneous on its face.

(c) Standard for Granting a Discovery Motion. With regard to any discovery request, the Commission will:

1. balance the relevancy of the material requested or the relevancy of questions posed and their likelihood of contributing to the rate determination process with their impact on the Commission's ability to comply with its regulations regarding the timing of its rate determinations; and

2. limit permitted discovery to matters the determination of which are required to ensure that an operator's proposed rate is within the maximum permitted level.

(d) Motion for Order Compelling Discovery. Upon reasonable notice to other parties, a party may file with the Commission a motion to compel discovery in the event that a request is not honored, or only partially honored, or interrogatories are not answered.

(3) Intervention and Participation.

(a) Initiation. Any person not initially a party who, with good cause, wishes to intervene in or participate in a rate proceeding shall file with the Commission a written request for leave to intervene or participate in the proceeding.

(b) Form and Content. The request shall state the name and address of the person making the petition. It shall describe with particularity the manner in which the person making the request is affected by the proceeding. It shall state the contention of the person making the request as to why intervention or participation should be allowed and how the interests of the person making the

request are not adequately represented by the issuing authority or other parties to the proceeding, the manner in which the person making the request seeks to take part in the proceeding, the issues such person intends to raise, and the relief sought and the basis therefor.

(c) Filing the Request. Unless an applicable statute requires otherwise, the request may be filed at any time following the date the Commission receives an operator's rate filing, but in no event, not less than seven days prior to the date of the hearing or later than such other date fixed by the Commission.

(d) Standard of Review. Requests filed may be allowed at the discretion of the Commission, however, the Commission may deny intervention if, in the Commission's judgment, such intervention would provide repetitive or irrelevant material. The Commission may limit the number of intervenors and participants to ensure a timely proceeding.

(e) Rights of Intervenors. Intervenors shall be persons substantially and specifically affected by the proceeding. Any person permitted to intervene shall have all the rights of, and be subject to, all limitations imposed upon a party; however, the Commission may exclude repetitive or irrelevant material. Every request to intervene shall be treated as a request in the alternative to participate.

(f) Rights of Participants. Any person specifically affected by a proceeding shall be permitted to participate. Permission to participate shall be limited to the right to argue orally at the close of any hearing and shall have the right to file written comments. Permission to participate, unless otherwise stated, shall not be deemed to constitute an expression that the person allowed to participate is a party in interest who may be aggrieved by any final decision. A person who petitioned to intervene and who was allowed only to participate, may participate without waiving its rights to administrative or judicial review of the denial of said motion to intervene.

(4) Hearings and Conferences.

(a) Pre-hearing Conference. The Commission may, upon its own initiative or upon the application of any party, call upon the parties to appear for a conference to consider:

1. the simplification or clarification of the

issues;

2. the possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreement which will avoid unnecessary proof;

3. the limitation of the number of witnesses, or avoidance of similar cumulative evidence;

4. the possibility of agreement disposing of all or any of the issues in dispute; and

5. such other matters as may aid in the disposition of the rate proceeding.

Those matters agreed upon by the parties shall be electronically recorded in the presence of the parties and/or reduced to writing and shall be signed by the parties, and shall thereafter constitute part of the record. The scheduling of a pre-hearing conference shall be solely within the discretion of the Commission.

(b) Conduct of Hearings.

1. General. Hearings shall be as informal as may be reasonable and appropriate under the circumstances.

2. Decorum. All parties, authorized representatives, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the conduct of serious affairs. Where such decorum is not observed, the Commission may take appropriate action.

(c) Presentation.

Rights of Parties. All parties shall have the right to present evidence, cross-examine, make objections, bring motions and make oral arguments. Cross-examination shall occur immediately after any witness' testimony has been received. Whenever appropriate, the Commission shall permit redirect and recross.

(d) Witnesses and Evidence.

1. Oath. A witness' testimony shall be under oath or affirmation.

2. Evidence. Unless otherwise provided by any

law, the Commission need not observe the rules of evidence observed by courts but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The weight given to evidence presented will be within the discretion of the Commission.

(e) Evidence Included. All evidence, including any records, investigative reports, documents, and stipulations which is to be relied upon in making a decision must be offered and made a part of the record. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

(f) Administrative Notice. The Commission may take notice of any fact which may be judicially noticed by the courts of this Commonwealth or of general technical or scientific facts within the Commission's specialized knowledge only if the parties are notified of the material so noticed and are given an opportunity to contest the facts so noticed.

(g) Written Comments. At the close of the taking of testimony, the Commission shall fix the terms for the filing of written comments.

(h) Settling the Record.

1. Contents of Record. The record of the proceeding may consist of the following items: pre-hearing conference memoranda, magnetic tapes, orders, written comments, and memoranda, answers to interrogatories, transcripts, exhibits, and other papers or documents which the Commission has specifically designated be made a part of the record. The record shall at all reasonable times be available for inspection by the parties.

2. Evidence After Completion. No evidence shall be admitted after completion of a hearing or after a case submitted on the record, unless otherwise ordered by the Commission.

3. Weight of Evidence. The weight to be attached to any evidence in the record will rest within the sound discretion of the Commission. The Commission may in any case require either party, with appropriate notice to the other party, to submit

additional evidence on any matter relevant to the proceeding.

207 CMR 6.60: PILOT PROGRAM

General.

(1) Effective Date. The effective date of 207 CMR 6.60 is December 31, 1993.

(2) Requests for Enrollment in the Pilot Program. An issuing authority requesting participation in the Pilot Program shall notify the Commission no later than January 14, 1994, in writing via certified mail, that it is seeking enrollment. This letter shall include:

(a) a statement that the issuing authority seeking enrollment in the Pilot Program has duly authorized its decision;

(b) a statement indicating the personnel and resources available to the issuing authority for the regulation of cable rates;

(c) an indication as to the first date following the effective date of these regulations that the issuing authority would be willing to commence rate regulation activities;

(d) a statement that the issuing authority has served a copy of its request for enrollment in the Pilot Program on the affected cable operator(s); and

(e) a statement that the issuing authority will adhere to all applicable state and federal laws and regulations.

(3) Comment Period. For a period of 15 days following January 14, 1994, the Commission will accept written comments relating to an issuing authority's request for enrollment in the Pilot Program. Issuing authorities will then have a period of 15 days to respond to the public comments.

(4) Selection Criteria. The Commission will allow up to, but no more than, six communities to enter the Pilot Program. The Commission will select the communities to be included in the Pilot Program based on:

(a) their apparent ability to conduct rate regulation on their own including whether or not they have, in the Commission's opinion, the necessary legal, technical, and financial expertise;

(b) a demonstrated past history with regard to effective decision making with regard to cable matters; and

(c) the extent to which the sample size will represent a cross section of communities.

(5) Enrollment Notification. The Commission shall notify all issuing authorities that have requested enrollment in the Pilot Program, as well as affected cable operators, via certified mail, of the communities selected to participate in the Pilot Program.

Pilot Program Communities' Procedures.

(6) Public Hearings. The Pilot Program Issuing Authority shall conduct a public hearing concerning the relevant operator's rate filing. The hearing shall be held no more than 45 days after the operator's filing and shall be scheduled consistent with procedures established in 207 CMR 6:37(3).

(7) Proprietary Information. Pilot Program Issuing Authorities shall be bound by the procedures the Commission must follow with respect to an operator's request for protection of proprietary information.

(a) Any operator aggrieved by a decision of a Pilot Program Issuing Authority in connection with a request for confidentiality may appeal such decision to the Commission. The Commission shall render a decision within 5 business days and the release of the information will be stayed pending review.

(b) No operator aggrieved by a Pilot Program Issuing Authority's decision in connection with a request for confidentiality may appeal that decision to the FCC without first appealing to the Commission.

(8) Issuing Authority Report. Within 75 days following the receipt by the Commission of an operator's rate filing, the Pilot Program Issuing Authority shall, after review of testimony and exhibits, file a report by certified mail - return receipt requested, simultaneously with the Commission and with the relevant cable operator. This report shall also be available to the public. The report shall set forth in detail its findings and the specific reasons for its findings. All documents, exhibits and the stenographic record of the hearing, if any, shall be transmitted to the Commission with the report.

(9) Commission Review. Within 45 days of receipt of the Pilot Program Issuing Authority's report, but not sooner than

21 days, the Commission shall issue a Certificate of Verification which shall make final a Pilot Program Issuing Authority's report and findings unless:

(a) within 21 days after the receipt of a Pilot Program Issuing Authority's report, a licensee files with the Commission an appeal of the Pilot Program Issuing Authority's report or any portion thereof; or

(b) the Commission determines that the findings of a Pilot Program Issuing Authority are not in accord with the FCC's and the Commission's regulations for determining reasonable rates.

If the Commission does not issue a Certificate of Verification, it shall after reasonable notice to all parties, schedule a hearing de novo to make a rate determination or to clarify that portion of the Issuing Authority Report in question and render a decision as soon as practical.

(10) General Waiver. The Commission shall be able to issue waivers to Pilot Program regulations during the Pilot Program to the full extent allowed under 207 CMR 6.85.

(11) Program Review. A Commission study and review of the Pilot Program shall commence 12 months following implementation of the Pilot Program. This study and review shall conclude with a written Commission Report on Pilot Program Findings. No later than 15 months following implementation of the Pilot Program, the Commission shall issue a Notice of Proposed Rulemaking based on the Commission Report on Pilot Program Findings. The Further Notice will subsequently direct the Commission's policy that will be based on the results of the Pilot Program. Communities enrolled in the Pilot Program will be able to regulate under these rules, unless waived, until the effective date of the new rules that would emerge from the Notice of Proposed Rulemaking.

(12) General Provisions. All applicable rules and regulations of the Commission will apply to Pilot Program Issuing Authorities.

207 CMR 6.86: SEVERABILITY

6.86: Severability

If any provision of these regulations is found to be invalid, illegal or unenforceable for any reason, such provision shall be severable from the remainder of the regulations' provisions and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.